SINGAPORE REPORTS

TAN HIN CHOON & ORS. v. BAN HIN LEE BANK LTD.

[C.A. (Wee Chong Jin C.J. Winslow and D Cotta JJ.)
September 14, 1972]
[Singapore — Civil Appeal No. 33 of 1971]

Land Law — Equitable mortgage — Subsequent conveyance in absolute form — Whether conveyance was an outright sale or mortgage only.

Limitation — Equitable mortgage to bank — Whether bank held property as trustee — Claim that bank held property as trustee — Whether claim statute barred — Limitation Act (Cap. 10), ss. 16, 18 & 27.

A, B and *C* were brothers and were directors of a private limited liability company. They purchased a piece of property at Pasir Panjang Road, Singapore sometime in 1947 as tenants-in-common in equal shares. Sometime in 1949, they deposited the title deeds of the said property with the respondent bank by way of an equitable mortgage to secure an overdraft facility of $100,000 in the name of the said company. By the end of 1953, the company's current account with the bank had been overdrawn to an extent above $200,000. By a conveyance made in December 1953, *A, B,* and *C* conveyed the said property for a consideration of $150,000 to the respondent bank. The solicitor who acted for both the parties in the transaction was at no time informed of the equitable mortgage. Sometime in May, 1956 the Registrar of Companies struck out the name of the said company from the register of companies.

In 1965, the appellants (i.e. *A, B* and the administratrix of *C*) for the first time wrote to the respondent bank asserting that the respondent bank were holding the said property as trustees for *A, B,* and *C* and that the property had been conveyed to the respondent bank to protect the same from other creditors of the said company. On these facts, the trial judge in dismissing the claim held that although the conveyance was a legal mortgage, the appellants' claim to redeem the mortgage was time barred because of sections 16 and 18 of the Limitation Act. On appeal, the Court of Appeal had to consider two issues:—

(a) Had the appellants shown that the conveyance absolute in form was intended to be a legal mortgage only and;

(b) If the conveyance was intended to be a legal mortgage only whether the appellants were barred by virtue of the Limitation Act from redeeming the said mortgage.

Held, dismissing the appeal and allowing the cross appeal: (1) the conveyance in truth represented the real bargin agreed between *A, B* and *C* and the respondent bank. The court exercising its jurisdication to retry the case on the record before it was of the view that the said conveyance on all the evidence and the surrounding circumstances was, in fact, and was intended by the parties to be an outright sale of the said property. There was no verbal agreement at any time to treat it as a legal mortgage only;

(2) the relevant sections of the Limitation Act pleaded by the respondent bank constituted a complete bar to the appellants' claim and the appeal should be dismissed with costs.

Cases referred to:-

(1) *Cockburn* v. *Edwards* (1881) 18 Ch. D. 449.
(2) *Harlock* v. *Ashberry* (1882) 19 Ch. D. 537, at p. 544.
(3) *In re Metropolis and Countries Permanent Investment Building Society* [1911] 1 Ch. 698.
(4) *In re Alison* (1879) 11 Ch. D. 284.
(5) *Wright* v. *Pepsin* [1954] 2 All E.R. 52.
(6) *Sanders* v. *Sanders* (1881) 19 Ch. D. 373.
(7) *Alderson* v. *White* 44 E.R. 924.

COURT OF APPEAL.

K. S. Chung for the appellants.

C. H. Smith and *R. Ramason* for the respondents.

Wee Chong Jin C.J. (delivering judgment of the court): Two questions are at issue in this appeal. The first is whether the appellants, Tan Hin Choon, Tan Hin Yam and Chong Swee Eng (w), administratrix of the estate of Tan Hin Pung deceased, have shown that a conveyance absolute in form made by the first and second appellants and Tan Hin Pung deceased in favour of the respondents, Ban Hin Lee Bank Ltd., was intended to be a legal mortgage only. The second question is whether, if the conveyance is held to be intended to be a legal mortgage only, the appellants are now barred by virtue of the Limitation Act (Ch. 10) from redeeming the mortgaged property.

The trial judge, although he held that the appellants have proved that "the conveyance was a legal mortgage", held that their claim to redeem the mortgaged property was time-barred because of the provisions of sections 16 and 18 of the Limitation Act (Ch. 10) and dismissed the appellant's action. The appellants now appeal and the respondents have cross-appealed. The appellants' contention is that the trial judge was wrong in law in holding that the Limitation Act operated to bar their claim. The respondents contend that the trial judge was wrong on the evidence and all the surrounding circumstances in holding that the conveyance was not an out and out sale.

It is necessary, therefore, to set out the undisputed facts and the surrounding circumstances under which the conveyance in question was executed and the subsequent conduct of the appellants and Tan Hin Pung deceased, in particular the manner and form in which the appellants prosecuted their claim to the property referred to in the conveyance.

The undisputed facts and surrounding circumstances are as follows. The first and second appllants and Tan Hin Pung deceased (hereinafter referred to as "the deceasd") are brothers. The property in question is a piece of land containing an area of 85,323 square feet on which were buildings collectively known as No. 801 Pasir Panjang Road, Singapore (hereinafter referred to as "the said property"). The brothers were directors of a private limited liability company known as Eng Wah Manufacturing Co. Ltd. The deceased and Tan Hin Choon were the managing directors. They had purchased the said property on 22nd September 1947 for an estate in fee simple at the price of $42,661.50 and on 5th December 1947 had mortgaged it by a deed of mortgage to a bank, Oversea-Chinese Banking Corp. as security for an overdraft not exceeding $40,000 of the current account with the mortgagee bank of a firm carrying on business as Pung Choon and Company of which the brothers were partners. On 9th January 1949 the brothers redeemed the mortgage and the mortgagee bank reconveyed the said property to them.

On 8th November 1948, Eng Wah Manufacturing Co. Ltd. opened a current account with the respondents, the application being signed by Tan Hin Choon the first appellant and all the three brothers were authorised to sign cheques on this account. On 13th January 1949 the brothers deposited the title deeds of the said property with the respondents to secure an overdraft not exceeding $100,000 in the current account of Eng Wah Manufacturing Co. Ltd. with inter-

est at the rate of 90 cents per $100 *per mensem* payable monthly. There was accordingly from 13th January 1949 an equitable mortgage of the said property to the respondents.

Less than four years later, on 30th November 1953 Eng Wah Manufacturing Co. Ltd.'s current account with the respondents was overdrawn to the extent of $202,693.26. There being no evidence before the trial court as to how the overdraft as at 30th November 1953 exceeded by $102,693.26 the maximum limit of $100,000 it can be inferred that a substantial portion of the excess was the accumulation of the interest payable monthly at the agreed rate of 10.8% *per annum*.

In November 1953 the respondents had in their employ since May 1948 one Wee Koh Yeow, described by himself as a senior clerk, whose duties according to himself were to give instructions to respondents' solicitors in respect of mortgages, purchases and sales of property and other legal matters. The respondents' solicitors at that time were Messrs. Donaldson & Burkinshaw. On 27th November 1953, Wee Koh Yeow, on the instructions of one Yeap Lean Seng, a director of the respondents, instructed Mr. Parker, solicitor, of Messrs. Donaldson & Burkinshaw, to prepare a conveyance of the said property to the respondents and handed the title deeds to Mr. Parker. The note Mr. Parker, at that time, made of Wee Koh Yeow's instructions reads:—

"Sale by

TAN HIN PUNG
TAN HIN CHOON
TAN HIN YAM

to

BAN HIN LEE BANK LTD.
BAKAR is making search to-day

No Contract

We will be told purchase price in a day or so

Please make C.C. [abbreviation of City Council] & S.I.T." [abbreviation of Singapore Improvement Trust].

A search was made in the Registry of Deeds on 27th November 1953, a requisition was made to the Singapore Improvement Trust on 28th November 1953 and a requisition was made to the Secretary of the Rural Board on 9th December 1953. Requisitions on title on behalf of the purchaser, the respondents, were drafted by Mr. Parker and one of the brothers, the deceased, answered these requisitions on title and signed them on 23rd December 1953. As Messrs. Donaldson & Burkinshaw also acted for the vendors, the brothers, in this transaction the answers given by the deceased to the requisitions on title were written down by Mr. Parker. On the same day the brothers executed a deed of conveyance of the said property in the presence of Mr. Parker. The conveyance was dated 24th December 1953 but the attestation clause of Mr. Parker is dated 23rd December 1953, this being the date when the brothers executed the conveyance (hereinafter referred to as "the said conveyance") which is in the usual form of an out and out sale. The said conveyance reads as follows:—

"THIS INDENTURE is made the 24th day of December One thousand nine hundred and fifty-three (1953) BETWEEN Tan Hin Pung, Tan Hin Choon and Tan Hin Yam all of Nos 9 and 10, Phillip Street, Singapore, merchants (hereinafter called 'the vendors') of the one part and The Ban Hin Lee Bank Limited a company incorporated in the Federation of Malaya and having a place of business at No. 52A, Circular Road, Singapore (hereinafter called 'the purchaser') of the other part.

WHEREAS the vendor are seised as tenants-in-common in equal shares of the hereditaments described in the Schedule hereto in fee simple in possession free from incumbrances.
AND WHEREAS the vendors have agreed to sell the said hereditaments to the purchaser at the price of Dollars one hundred and fifty thousand ($150,000/-).

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Dollars one hundred and fifty thousand ($150,000/-) to the vendors now paid by the purchaser (the receipt whereof the vendors hereby acknowledegs) the vendors (each of them so far as it relates to his one-third share, right title and interest of and in the hereditaments described in the Schedule hereto) hereby conveys unto the purchaser all the hereditaments described in the Schedule hereto TO HOLD to the purchaser its successors and assigns in fee simple.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO

ALL that piece of land situate in the District of Pasir Panjang in the Island of Singapore estimated according to the Government Resurvey to contain an area of 85,323 square feet and marked on the Government Resurvey Map as Lot 120[4] of Mukim III being part of the land comprised in East India Company's Grant No. 43 dated the 3rd day of July 1858 and made in favour of Wah Srepah.

TOGETHER with the buildings erected thereon and known as No. 801, Pasir Panjang Road, Singapore.

SIGNED SEALED AND DELIVERED by the abovenamed Tan Hin Pung, Tan Hin Choon and Tan Hin Yam in the presence of:—)

Sd. Tan Hin Pung (L.S.)
Sd. Tan Hin Choon (L.S.)
Sd. Tan Hin Yam (L.S.)

Sd. Wee Koh Yeow.

Sd. T. C. Chua.

ON this 23rd day of December, A.D. 1953 before me EDWARD ANSELM PARKER an advocate and solicitor of the Supreme Court of the Colony of Singapore practising in the Island of Singapore personally appeared TAN HIN PUNG, TAN HIN CHOON and TAN HIN YAM who from information given to me by trustworthy and respectable persons, viz: Wee Koh Yeow of Ban Hin Lee Bank Limited, Singapore, clerk, and T. C. Chua of Mercantile Bank Chambers, Singapore 1, solicitor's clerk, I verily believe to be the identical persons whose names 'Tan Hin Pung', 'Tan Hin Choon' and 'Tan Hin Yam' are subscribed to the within written instrument and acknowledged that they had voluntarily executed this instrument at Singapore.
WITNESS my hand.

Sd. E.A. Parker".

The purchase price, which is stated as $150,000 in the said conveyance, according to Mr. Parker from a note in the file relating to this transaction, was made known to his firm on 22nd December 1953. Mr. Parker was at no time told by anyone that the respondents were holding an equitable mortgage on the said property. He was also not told by anyone that Yeap Lean Seng and the deceased had agreed that the respondents would hold the said property on trust for the brothers or as security for the overdraft account of Eng Wah Manufacturing Co. Ltd. and would transfer the said property back to the brothers when the amount owing by Eng Wah Manufacturing Co. Ltd. had been repaid

to the respondents. As regards payment of the purchase price Mr. Parker's recollection was he was told that the purchase price would not be coming through his office and that almost certainly he must, before the execution of the said conveyance, either have asked whether the purchase price had been paid or had been instructed that it had been paid.

A licensed valuer in 1969 was asked to value the said property as at November 1953 and his valuation, which is said to be based on the sale of an adjoining property in 1957 at the price of $2.00 per sq. foot, is $170,000. The valuer, however, agreed that the same adjoining property which had an area of 75,000 sq. feet was sold in March 1953 for $120,000/- i.e. at $1.60 per sq. foot.

At the date of the said conveyance Eng Wah Manufacturing Co. Ltd. were in occupation of the said property but after the conveyance the respondents entered into possession and one month later in February 1954 let it to some one else at a monthly rent of $500 which subsequently was increased to $600. On 21st May 1956 the Registrar of Companies struck out Eng Wah Manufacturing Co. Ltd. from the Register of Companies.

From December 1954 until Tan Hin Pung died on 25th March 1962 none of the brothers mentioned to anyone verbally or in writing or made a note in writing that the said property had been conveyed under the said conveyance to the respondents to be held in trust for them or that the said conveyance was not intended to be an out and out sale but was intended to be a legal mortgage. Tan Hin Pung appeared apparently to have, before his death, informed his widow, the third appellant, who wrote four letters to Yeap Lean Seng, the first of which was on 12th June 1964 and the last on 22nd October 1964. As his widow did not give evidence at the trial it is only from the contents of these four letters that it can be inferred that Tan Hin Pung before his death told his wife that the said property had been "transferred to (the respondents) as a safe keeping only as well as to protect the property from any other creditors of the company".

On 23rd March 1965 the appellants, through their solicitors, for the first time wrote to the respondents asserting that the said property was conveyed by the said conveyance to the respondents as trustees for the brothers and requesting the respondents under section 45 of the Trustees Ordinance (now section 48 of the Trustees Act) to convey the said property to the appellants. A letter of the same date by the appellants' solicitors was addressed to Yeap Lean Seng asserting that the said conveyance "was made to the bank as trustees" for the brothers. At this stage the claim was merely that the respondents held the said property as trustees for the brothers. The respondents, through their solicitors, replied on 25th March 1965 denying the allegations and stating that the respondents become the absolute owners of the said property under the said conveyance.

On 18th December 1965 the appellants commenced the present action and by their statement of claim alleged that

"on the 24th day of December 1953 the property was conveyed by the (brothers) to the (respondents) upon terms that they should stand possessed of the same upon trust for the (brothers) and convey the same to the (brothers) on request".

It was not until mid way during the trial of the action which commenced on 26th May 1969 that the appellants applied to the trial court for leave to amend the statement of claim to plead in the alternative that they claim as mortgagors of the said property of which the respondents are mortgagees. On 16th March 1970 at the resumed trial of the action, the respondents not objecting, the trial court gave leave to amend the statement of claim. The amendments to the original statement of claim are as followers:—

"3. In the alternative the plaintiffs claim as mortgagors of the property of which the defendants are mortgagees.

4. The following are particulars of the said mortgage:—

i) The said mortgage was made on the 13th day of January 1949 by the brothers by way of deposit of title deeds of the property with the defendants as mortgagees to secure the overdraft account current of Eng Wah Manufacturing Co. Ltd. (hereinafter called the company) with the defendants.

ii) The limit of the overdraft was to be $100,000 and the rate of interest chargeable by the defendants and agreed to be paid by the brothers was 90 cents per $100 *per mensem* payable monthly.

The said particulars are contained in a letter dated the 13th day of January 1949 from the defendants to the brothers.

7.(a) Alternatively, the plaintiffs desire to redeem the said mortgage and with that object the 3rd plaintiff has offered by letter to the defendants of the 12th June 1964 to repay to the defendants the whole of the principal sum and interest then due and outstanding under the said mortgage but the defendants by letter dated the 25th March 1965 from their solicitor contended that the plaintiffs were not entitled to redeem the said mortgage by reason of the said conveyance dated the 24th day of December 1953.

(b) The plaintiffs hereby offer to repay after a due interval of notice or with appropriate interest in lieu of such notice the whole of the said principal sum and interest up to the 31st day of October 1954 provided that the defendants' right to the said principal sum and interest is not barred by the Limitation Ordinance 1959 on which the plaintiffs hereby rely.

8. The plaintiffs will contend that prior to the execution of the said conveyance the brothers as mortgagors and the defendants as mortgagees agreed as follows:—

a) that the said mortgage constituted by the deposit of the title deeds as aforesaid on the 13th January 1949 should continue and have full effect save and except that no interest was payable by the brothers;

b) that the brothers should execute a conveyance purporting to convey the property to the defendants at the entire costs and expense of the brothers so as to enable the brothers not to pay further interest on the said mortgage;

c) that notwithstanding the said conveyance the parties should continue to give full effect to the terms of the said mortgage (save and except the condition relating to payment of interest) as if the said conveyance had not been executed or alternatively, with the intent that the said conveyance should take effect as a legal mortgage; and

d) that the brothers' right to redemption of the property should ensure for their benefit as mortgagors.

9. In pursuance of the said agreement the brothers on the 24th day of December 1953 executed the purported conveyance whereupon the defendants continued to treat the said mortgage as subsisting and gave full effect thereto (even as to the condition of payment of interest up to and including the month of October 1954).

Particulars of the defendants treating the said mortgage as subsisting:—

a) Charging of interest against the company up to and including the month of October 1954 (contrary to the said agreement).

b) Debiting the company with the legal costs of vendors and purchasers charges by the defendants' solicitors.

c) Debiting the company with the amount in insurance premiums on the property up to the 21st day of February 1961.

d) Debiting the company with the assessment payable on the property up to the 31st day of July 1961.

e) Crediting the overdraft of the company secured by the said mortgage with payment of the sum of $25.000 for the period from the 4th day of March 1955 to the 12th day of July 1961.

f) Permitting the company to grant a tenancy of the property to Yong Lee & Co. Sago Factory from February 1954.

10. The plaintiffs say that the purported conveyance relied upon by the bank to prevent the plaintiffs from redeeming the said mortgage is illegal and void as a clog on the plaintiffs' right to redeem the said mortgage and is not capable of being enforced against the plaintiffs or any one of them.

11. Relying on the representations by the defendants as set out in paragraph 8 hereof the brothers executed the said conveyance which they would not have done but for the said representations and the plaintiffs will say that the defendants cannot be heard to deny the plaintiffs' right either to redeem the property or alternatively to call for a conveyance of the property held by the defendants as trustees thereof by virtue of section 48 of the Trustees Act, 1967.

12. The plaintiffs claim:—

(1) A declaration that the property now registered in the name of the defendants is held by them on trust for the plaintiffs absolutely.

(2) Alternatively a declaration that notwithstanding the said conveyance of the 24th day of December 1953 the plaintiffs are entitled to redeem the property comprised in the said mortgage upon payment to the defendants of the principal sum secured by the said mortgage with interest thereon up to the 31st October 1954 less the sum of $25,000 provided that the defendants' right to the said principal sum and interest is not barred by the Limitation Ordinance 1959 as aforesaid".

Leave was granted to amend the statement of claim on the ground that the only witness called by the appellants had, in his evidence before the court, testified that the said conveyance was intended to be a mortgage and not an out and out sale. Not one of the three appellants gave evidence at the trial. Yeap Lean Seng, the director who handled the transaction in December 1953 gave evidence at the trial. He denied that there was any verbal agreement that the respondents would hold the said property as mortgagees and would reconvey the said property to the brothers on repayment of the overdraft of Eng Wah Manufacturing Co. Ltd. as at the date of the said conveyance without paying any interest.

It is not in dispute that the consideration of $150,000 stated in the said conveyance was not handed over to the three brothers. It also appears, from the books kept by the respondents in the course of their business as bankers, that a sum of $150,000 was credited to Eng Wah Manufacturing Co. Ltd.'s account with the respondents only on 29th December 1961. It also appears from the respondents' books that the rents paid to the respondents were as and when paid credited to the account of Eng Wah Manufacturing Co. Ltd. It also appears from the respondents' books that the respondents ceased to debit interest on Eng Wah Manufacturing Co. Ltd.'s overdrawn account as from 1st November 1964. It also appears from the respondents' books that they debited the purchaser's costs of the said conveyance against the account of Eng Wah Manufacturing Co. Ltd. as well as insurance premiums and assessments on the said property.

From the above facts and surrounding circumstances, apart from the entries in the respondents' books kept in the ordinary course of their business as bankers, it seems to us an irresistible conclusion that the said conveyance in truth represents the real bargain agreed between the brothers and the respondents. The reasons why we say this conclusion seems irresistible are these —

(1) The onus on the brothers of proving that there was a separate verbal agreement under which the respondents, a bank, agreed to hold the said property either in trust or merely as mortgagees without charging interest is a very heavy onus.

(2) The two brothers who are still alive at the hearing of the action did not go into the witness box to give evidence that there was such a verbal agreement. The third appellant also did not go into the witness box to give evidence as to how she came to know that there was such a verbal agreement.

(3) The failure of the appellants, in particular the first and second appellants, to give evidence raises a presumption against the truth of their claim which requires cogent and convincing evidence to dispel.

(4) This failure is also the strongest possible circumstance against accepting the evidence of the sole witness who testified as to the terms of the alleged verbal agreement particularly where this sole witness is related to the appellants and clearly not a completely disinterested witness.

(5) The fact that the purchase price was not an undervalue.

(6) The fact that the said property at the date of the said conveyance was already held by the respondents as equitable mortgagees.

(7) The fact that Eng Wah Manufacturing Co. Ltd., which was owned by the brothers, was so heavily indebted to the respondents and the security held by the respondents was insufficient to cover this indebtedness.

(8) The fact that no claim was made for over ten years and when it was formally made it is asserted that the respondents held the said property as bare trustees for the brothers.

(9) The fact that the claim was amended, after the sole witness had given evidence, to allege as an alternative claim that the respondents had agreed to hold the said property as mortgagees to secure the overdraft account of the brothers' company but with no interest payable thereon.

(10) The presumption ought to be drawn, unless there is clear and convincing evidence to the contrary, that a bank in the common course of its business is not likely to enter into an arrangement with a customer under which it forgoes its right under an existing equitable mortgage to interest for money advanced by it to the customer.

It remains now to consider what is the evidence, apart from the respondents' books, relied on by the appellants to prove there was a separate verbal agree-

ment with the intent that the said conveyance should take effect as a legal mortgage. As we have earlier said the sole witness called by the appellants was Wee Koh Yeow, a relative of the brothers. At the trial he testified that the solicitor acting for the respondents in the action attempted on behalf of the respondents to bribe him. This was denied on oath by the solicitor and by Yeap Lean Seng and another director and the trial judge found that Wee Koh Yeow had fabricated this allegation of a bribe in order to embellish his story and strengthen the appellants' case. The trial judge said he did not believe a word of it and said he was completely convinced that it was untrue.

Notwithstanding his assessment of Wee Koh Yeow as an untruthful witness who had fabricated a serious and false allegation in order to embellish his evidence and to strengthen the appellants' case, the trial judge found that the said conveyance "was a legal mortgage as claimed by the (appellants)" because of certain entries, which we have already referred to, in the respondents' books kept by them in the ordinary course of their business as bankers. The trial judge rejected the explanations given by Yeap Lean Seng, by another director and by a ledger clerk of the respondents that there had been omissions to make entries at the appropriate times and that some of the entries had been mistakenly made and apparently preferred the evidence of Wee Koh Yeow as to the reasons why these entries appeared in the respondents' books.

In our opinion it is apparent from the judgment of the trial judge that his finding in favour of the appellants on this issue was not based on his acceptance of the evidence of Wee Koh Yeow in preference to the evidence of Yeap Lean Seng. It is also clear, in our opinion, that the trial judge did not take into consideration any of the reasons we have earlier enumerated which clearly indicate that the said conveyance in truth set out the true bargain between the brothers and the respondents. In these circumstances, this court exercising its jurisdiction to retry the case on the record before it, including in such retrial the appreciation of the relative values of the witnesses, has arrived at the clear view that the said conveyance, on all the evidence and the surrounding circumstances, was in fact and was intended by the parties to it to be what it purports to be, namely an outright sale of the said property. We are also of the opinion that there was no verbal agreement between the parties to the said conveyance either prior to, simultaneous with or subsequent to it to treat it as a legal mortgage only.

Even if it could be said that the trial judge's finding on this issue is based to some extent on his acceptance of Wee Koh Yeow's evidence in preference to that of Yeap Lean Seng and the evidence of the other witnesses of the respondents, it seems to us that the trial judge's finding is not based on his view of the comparative credibility of opposing witnesses, arrived at by observations of the witnesses as they gave their evidence. Accordingly, in our judgment, the advantage which a trial judge has as against an appellate tribunal of having seen the witnesses as they gave their evidence, is not a strong factor present in this case and this court would be justified in reversing the trial court's findings of fact if we consider there are sufficient grounds for doing so. Having regard to our view that Wee Koh Yeow was a thoroughly dishonest and unreliable witness and having regard to the reasons we have already enumerated we are of the opinion that the appellants have failed to discharge the onus on them of proving that the said conveyance was not in fact and was not intended by the parties to it to be what it purports to be.

Assuming, however, that the judge was right in concluding that the conveyance of 24th December 1953 was a legal mortgage of the property in question in favour of the respondents to secure the overdraft facilities given to Eng Wah Manufacturing Co. Ltd. (hereinafter referred to as "the debtors") and not an outright sale as claimed by them, we now turn to the contentions of the appellants that the trial judge erred in law as follows:—

(i) in deciding that rents received by them as mortgagees in possession from the tenant thereof and credited to the current account of the debtors were not receipts within the meaning of the expression as used in the proviso to section 16 of the Limitation Act (Cap. 10);

(ii) in deciding that payments made by the respondents of the annual assessment and fire insurance premium payable on the mortgaged property and then debited to the said current account "did not constitute an acknowledgment in writing of the appellants' title to, and/or equity of redemption in, the property within the meaning of sections 16 and 27 of the Limitation Act";

(iii) in deciding that the appellants' claim to redeem the said property was an action to recover land under section 18 of the Limitation Act;

(iv) in failing to give effect to the terms of the agreement he had found to be made in respect of the said property providing for the appellants to redeem at any time they were able to do so upon payment of principal and interest.

With regard to ground (i) we are of the view that the trial judge was right in holding that payments made by the tenant in respect of rent due to the respondents as mortgagees in possession were not payments made by the mortgagors or by anyone on their behalf. As Jessel M.R. said in *Cockburn* v. *Edwards*:[1]

"The mortgagee receives rents which are his own, subject of course, to the right of redemption; he is not receiving interest or principal, but receiving the rents of the property which belongs to him subject to the right of the mortgagor to redeem it".

Jessel M.R. again in *Harlock* v. *Ashberry*[2] reiterated that payment of rent made by a tenant to a mortgagee in possession was not a payment of principal or interest and that in order to be such a payment it must be made by a person liable to pay principal or interest.

Jessel M.R. at page 545 stated:

"Clearly the tenant is not liable to pay either the principal mortgage money or interest; he is liable to pay rent whether the amount of the rent be more or less than the amount of the interest on the mortgage debt. The underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right".

Brett L.J. also in the same case at page 547 said —

"Then the question arises whether payment of rent by a tenant to a mortgagee who has exercised the right to demand the rent, is a payment of principal or interest within that section. I come to the conclusion that it is not, for three reasons: 1. It is, at the present stage, no payment at all as between the mortgagor and mortgagees — it is only an item in an account which will have to be settled between the mortgagor and mortgagees — an item in an account which is to go to the credit of one party to that account, that account containing many items more on the same side besides principal and interest and costs — e.g., expenses, repairs, etc. That cannot be called payment either of principal or interest at all. 2. It is not a payment within the section because it is not, as made, a payment of principal or interest — it is a payment of rent — rent paid by the person making the payment, and rent received by the person receiving the payment. It seems to me that payment made as of rent and received as of rent cannot be said to be a payment of principal or interest. 3. But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, ...".

The trial judge found that it was

"more probable than not that the eight cheques in question were for rent payable by the tenant of the said property as they were drawn by the tenant in favour of the respondents who were the registered owners. There is support for this view in the evidence of Tong Moh Tim. He is the person who signed the cheques and his evidence is that they were given for rent due to the defendants."

In view of this clear finding it is impossible for us to say that the payments in question were "received by the respondents in respect of the principal or interest of the mortgage debt" within the proviso to section 16 of the Limitation Act on which the appellants rely. We think that the trial judge was absolutely right in holding as he did and that this ground is without any merit whatsoever.

We also hold that there is no merit whatsoever in the second ground of appeal that payment each year of assessment and fire insurance premium on the said property which was subsequently debited to the current account of the debtors constituted an acknowledgment in writing of the mortgagors' title and/or their equity of redemption within the meaning of sections 16 and 27 of the Limitation Act. Section 27 states quite categorically that such an acknowledgment, as is referred to in the proviso to section 16, shall, first, be in writing and signed *by* the person making the acknowledgment (and may be made by that person's agent) and that, secondly, it shall be made *to* the person, or to an agent of the person, whose title or claim is being acknowledged. This seems to us a most unworthy ground of appeal which has merely to be stated in the form in which was propounded in argument to be rejected. It was contended that entries in the bank's books which were made in writing and initialled by an officer thereof satisfied the first requirement and that the second requirement was satisfied by the fact that solicitors for the respondents allowed inspection of these entries in the bank's books to be made on 16th January 1967 by the solicitors for the appellants as agents for the appellants.

The entries in the respondents' books seem to us to be of a domestic nature and were undoubtedly intended in the first instance to be used for purposes of the bank's own internal administration. The entries relied upon were not communicated at any time within the period prescribed by the Limitation Act to the appellants or any agent of theirs so as to amount to an acknowledgment by the respondents of the title of the mortgagors any more than the published accounts of the society (pursuant to section 40 of the Building Societies Act, 1874) in *In re Metropolis and Counties Permanent Investment Building Society*[3] constituted the making of acknowledgments of the mortgagors' title (contained therein) within the meaning of section 7 of Real Property Limitation Act, 1874. Neville J. at page 705 said —

"Did this publication of the acknowledgment amount to the giving of an acknowledgment to the mortgagor within the meaning of section 7 of the Limitation Act? The mortgagor certainly never received it and I think it did not."

In our view the fact that the solicitors for the appellants on discovery, in 1967, saw the entries concerned, long after the matter became statute-barred, cannot by any stretch of imagination be said to be an acknowledgment to the appellants of their title in any sense of the term. The provisions of the Limitation Act would be rendered farcical if every solicitor, after a writ had been issued, were to inspect an entry such as this, which had not earlier been communicated to his client within the statutory period as an acknowledgment, and were then to claim that because he had seen it, the action was not barred because he was an agent for his client and had received an acknowledgment by virtue of having seen that entry albeit outside the statutory period (see *In re Alison*[4]). *Wright* v. *Pepin*[5] at pages 55, 56 is authority for the proposition that the old rule stated in *In re Alison* and *Sanders* v. *Sanders*[6] that an acknowledgment after the expiry of the limitation period is ineffective, still applies.

The appellants further contend in ground (iii) that the trial judge was wrong in deciding that the claim to redeem the mortgaged property was "an action to recover land" within section 18 of the Limitation Act and that an action to recover land within the statutory period of 12 years does not include a redemption action so as to bar the appellants' claim to redeem the said mortgage. It had been agreed between the parties that the date of the amended statement of claim on 29th May, 1969 should be the effective date for the purposes of the Limitation Ordinance, 1959 (now the Limitation Act) and not the date of the writ *i.e.* 18th December, 1965. The action to redeem was accordingly barred on the expiry of more than 12 years since 24th December 1953 but it was contended that the action for recovery of land was not since it did not include a redemption action.

The period of limitation in respect of both an action to redeem and an action for recovery of land is the same i.e. 12 years except that, in the case of an action for recovery of land, circumsances such as those set out in section 22(1) relating to matters like fraud by a trustee, which is not alleged in the present case, protect a beneficiary by making the period of limitation inapplicable. Section 18 operates to extinguish the right

and title of any person who fails to bring such an action for recovery of land but might have done so within the prescribed period. The trial judge found as a fact that the bank was "in possession of the property and collecting its rents ever since the conveyance was executed and was not a trustee for the mortgagee". The quarrel with the trial judge's written judgment is based solely on his opinion that the expression "action to recover land" in section 18 includes a redemption action.

Counsel for the appellants placed reliance on section 16 of the English Limitation Act, 1929 which includes a redemption action in an action to recover land. Our section 18 which is the corresponding section in our Act does not specifically do so and it was therefore argued that the trial judge was wrong.

As counsel for the respondents pointed out, in reply, the complete answer to this objection to the trial judge's expression of opinion lies in the fact that even in England the words in brackets in section 16 of the English Act "(including an action for redemption)" are superfluous, see *Sanders* v. *Sanders*, where Malins V.C. said —

"'At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action or suit respectively, might have been made or brought within such period shall be extinguished'. But the meaning of that is that the right or title shall be extinguished in favour of those who desire it to be so, but not as to others. And a right to make an entry is under the same rules as a right to redeem."

Furthermore, section 2(4) of our Act states quite clearly that —

"References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or in the case of rent charges any right to distrain for arrears of rent and references to the bringing of such an action shall include references to the making of such an entry or distraint."

In our view this ground too is without any merit.

It only remains to consider the final ground — ground (iv) — purportedly also relating to the Limitation Act though as stated in the petition of appeal at paragraph 3(4), it is silent on what exactly the ground is, so far as limitation is concerned. The complaint is that as the trial judge had found in favour of the appellants' contention of an oral agreement, prior to the conveyance, "providing for the appellants to redeem at any time they were able to do so on payment of the principal and interest owing" to the bank, the trial judge should have given effect to that agreement.

We are unable to understand this contention in view of the fact that the Limitation Act is clearly against the appellants for the reasons already stated and we accordingly reject it although some attempt was made in argument to invoke the Limitation Act, indirectly, by reference to *dicta* in *Alderson* v. *White*[7] where Lord Chancellor Cranworth thought it unnecessary to decide the question on the Statute of Limitations. It is noteworthy that the Lord Chancellor concluded his judgment by saying,

"but that does not dispose of the question, whether the statute would not bar any such right to redeem on terms different from those expressed in the deed."

The terms in the present appeal based on the oral agreement relied upon are "payable when able", in effect, and we can see nothing in the Lord Chancellor's judgment which assists the appellants at all. In our view, the relevant sections of the Limitation Act pleaded by the respondents constitute a complete bar to the appellants.

For all these reasons we dismissed the appeal and allowed the cross appeal with costs.

Appeal dismissed.

Solicitors: *Chung & Co.; R. Ramason.*

MANAP BIN MAT v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPN. LTD.

[O.C.J. (Kulasekaram J.) September 20, 1972]

[Singapore — Originating Motion No. 10 of 1972]

Insurance — Arbitration — Application to set aside — Extended cover — Condition — Breach — "Authorised driver" — Substitution for "insured".

This was an application by the respondents to set aside a joint final award made by two arbitrators in connection with a claim arising out of a motor insurance policy issued by the respondents in respect of a motor car SR.7408.

The respondents resisted the claim primarily on two grounds. First, they alleged the claim was time barred under condition 8 of the policy in that the claim had not been referred for arbitration within 12 months of their having disclaimed any liability under the policy to the insured. This issue was the subject of an interim award by the two arbitrators who held that the claim was not time barred. This decision, though reversed by the High Court, has been upheld by the Court of Appeal ([1971] 1 M.L.J. 134).

Secondly, the respondents alleged that the insured had breached condition 3 of the policy in that the insured had failed to take reasonable steps to maintain the said motor vehicle, immediately before or at the time of the said accident, in an efficient condition.

The two arbitrators, Messrs Godwin and Grimberg, proceeded to inquire into the second issue and made a joint final award. Mr. Godwin, found that there was no reliable evidence that the shock absorbers of the car were inefficient and that even if he was wrong on that point, he went on to find that there was no evidence that the insured had failed to take all reasonable steps to maintain the vehicle in question in an efficient condition. Mr. Grimberg found that the respondents had discharged the onus of proving that the vehicle in question was not maintained in efficient condition by reason of the fact that the shock absorbers were defective. He did not make a further finding whether the insured had failed to maintain the car in an efficient condition. Both the arbitrators found "that condition 3 of the relevant policy, insofar as it imposes an obligation on the insured to take all reasonable steps to maintain the said vehicle in an efficient condition, did not apply to the authorized driver of this motor car,....".

In this application, the respondents sought to have these findings and the award set aside or remitted.

Held, dismissing the applications: (1) having regard to the decision in *Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.*,[1] when condition 3 or any part thereof was applicable to the new insured, the authorized driver, then that condition 3 or that part of condition 3 should be read with the words "authorized driver" substituted for "insured" in it. It is this new or modified condition 3 that is applicable to the authorized driver and not the original condition 3. That being so a breach of the original condition